IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT OF GHANA

ACCRA AD---2016

IN THE MATTER OF THE WILLS ACT, 1971, ACT 360 AND THE 1992 REPUBLICAN CONSTITUTION

AND

IN THE MATTER OF THE ESTATE OF GEORGE ASARE NTIM (DECEASED)

AND

APPLICATION FOR REASONABLE PROVISION OUT OF THE ESTATE OF GEORGE NITIM (DECEASED)

AKUA MARFOA --- APPELLANT/ RESPONDENT/ APPELLANT

VRS

MARGARET AKOSUA AGYEIWAA --- RESPONDENT/ APPELLANT/ RESPONDENT

Coram : Baffoe-Bonnie, Akoto-Bamfo(Mrs), Benin, Appau, and Pwamang,JJSC

JUDGMENT

BAFFOE-BONNIE JSC------This is an appeal by the Appellant/ Respondent/ Appellant (hereinafter, Appellant) against the decision of the Court of Appeal, allowing the appeal from the judgment of the High

Court in Accra, dated the 25th day of February, 2006. The judgment against which this appeal is brought was delivered on 31st March 2006.

The facts are fairly simple and generally uncontroverted.

The Appellant and the Respondent were both married to the late George Asare Ntim who died testate on 15th July, 1995. The will of the deceased was read in 1995. Under the will, the testator gave the respondent and her six children, jointly, a house at Mateheko in Accra known as Number B262/15 West Abossey Okai; two thirds of his farm at Odwaa near Akokoaso and a portion of his house also at Odwaa. The testator also gave three rooms in his house at Odwaa and a third of his farm at Odwaa to his three children which he had with the appellant. The testator did not make any provision for the appellant under his will.

The executors that were named in the will renounced their right to executorship. On 10th June, 2002, Letters of Administration with Will annexed, was granted by the High Court to the respondent. The appellant took an action by originating summons to the High Court on 6th July, 2002 for reasonable provision out of the estate of the testator. The High Court granted the application and made the following orders:

1) One plot of the Testator's land known as House Number B262/15, West Abossey Okai, Accra.

2) One room in the house of the testator at Odwaa near Akokoaso for life.
3) The testator's farmland at Odwaa near Akokoaso should be divided into equal parts and one portion to go to appliacant (Akua Marfoa) and her children Nancy Abena Pokua, Rosina Yaa Gyanmea and Andrews Kwabena Nti.

The respondent appealed against the ruling of the High Court. The Court of Appeal set aside the ruling of the High Court and in place of it, substituted an order refusing the application. The reasons for reversing the decision of the High Court by the Court of Appeal, which were essentially procedural lapses are captured in the statement by Gbadegbe JA(as he then was)as follows;

"In this regard, the requirement of placing all the facts before the court that might indicate the Appellant's needs in terms of bare necessities and other requirements of a decent standard of living become relevant in order to assist the court to consider the extent and mode of its interference as provided in sub-section 2 of section 13. Where, however, these vital facts are absent as was the case in the court below then the court is precluded from a fair determination of the discretion available to it. We venture to say that on the materials before the court below on

which the decision on appeal is based the determination made was without regard to the "relevant circumstances" and may thus be said to be based purely on speculation and or conjecture, a situation that defeats the clear statutory intention discernible from the enabling section".

Grounds of Appeal:

Before us the appellant has argued as follows;

a. That, the Court of Appeal erred by placing excessive burden of proof on the Appellant/ Respondent/ Appellant regarding her dependence on the testator in his life-time and the likelihood of hardship without reasonable provision.
b. That the Court of Appeal erred in making findings of fact not borne out by the affidavit – evidence.
c. That the Court of Appeal erred in not ordering a re-trial in the light of the findings made by itself.
d. The Court of Appeal erred by not looking at the merits of the case but dwelt on the technicalities which led to miscarriage of justice.
e. That the Court of Appeal erred by not exercising its original jurisdiction to correct the mistakes of the trial Court.

f. That the Court of Appeal erred by applying principles and practices incompatible with our society and not envisaged by our laws, in particular the 1992 Constitution.
g. The judgment is against the weight of evidence on record.

Addressing of Issues:

A preliminary issue was raised by the respondent in the High Court that since she was not the only beneficiary of the estate and also that she has not been given the vesting assent, she did not have the capacity to defend the action. We do not do not think this is so.

Section 1(1) of the Administration of Estates Act, 1961, (Act 63) provides that:

> "The movable and immovable property of deceased person shall devolve on his personal representatives with effect from his death".

Under **section 108 of Act 63**," personal representative" is defined as;

> "the executor, original or by representation, or administrator for the time being of a deceased person"
>
> "Administrator" means "a person to whom representation is granted by the Court".

"Administration" means "letters of administration whether general or limited, or with the will annexed or otherwise, when that term is used with reference to the estate of a deceased person".

From the facts, evidence was given that the executors had renounced their right to executorship. Letters of administration with will annexed was granted to the respondent and as such she became the personal representation of the deceased. As the Administratrix of the estate, and since the assets had not been distributed, the respondent was in charge of the deceased's whole estate. The defendant was therefore sued in her capacity as the personal representative of the deceased and not as a beneficiary.

On the point that the respondent lacks capacity to defend the action because the properties have not been vested in her by way of vesting assent, see the case of **In Re Anim-Addo (Deceased) Nkansah alias Anane and Another v Amomah - Addo and Another [1989-90] 2 GLR 67** . In that case there was an application by a widow under section 13(1) of the Wills Act, 1971 (Act 360), praying the court for an order for financial provision to be made for herself and her infant son aged eight. The executors of the estate raised a preliminary objection to the power of the Court to entertain the application before

grant of probate. It was contended that the application was premature, since the executors had no access to the estate of the testator and were therefore incapable of executing any orders of the court.

In dismissing the preliminary objection, **Emelia Aryee, Ag. J** said:

> " Section 13(1) of the Wills Act, 1971 (Act 360), had its purpose; it was to warn beneficiaries and any persons claiming any interest in the estate of the testator or under the will to come within three years before the estate was shared out. Executors unlike administrators, derived their power under the will and not from the grant of probate or letters of administration"

By contrast administrators get their power from the instrument appointing them as such, in this case, the Letters of Administration. As such, once the letters of administration were granted to the respondent it was proper for the appellant to bring an action for reasonable provision out of the deceased's estate against the respondent as his personal representative, even without the vesting assent.

The Court of Appeal also intimated that the other beneficiaries under the will should have been included in the action because the outcome will affect their interests. We do not think this was necessary because the respondent was sued in her capacity as administrator and not as a

beneficiary. So it is her duty to protect the interest of the whole estate of the deceased. Again the respondent had not yet distributed the properties and prepared vesting assets in respect of the properties, so the beneficiaries could not be sued.

Azu Crabbe in his book, **Law of Wills in Ghana**, at page 175, paragraph three wrote:

> "It is now well established that a will made by a Ghanaian becomes operative and no more, as from the date of the testator's death. His intention expressed in the will has no legal effect, until the will is admitted to probate".

From this, the inference that can be drawn is that the property divulged to the various beneficiaries does not take effect until probate is granted and so since the Administrator has not yet been granted probate, the devolutions to the various beneficiaries have no legal effect yet. As such it is only the personal representative who should be sued.

The main issue before us is whether the High Court exceeded its jurisdiction by making orders for the reasonable provision of the defendant out of the estate of the late George Asare Ntim?

It is the respondent's position that the High court acted in excess of its jurisdiction by purporting to enforce and interpret Article 22(1) of the

1992 Constitution. Rather, it should have referred the matter to the Supreme Court under Rule 67 of the Supreme Court Rules, 1996 (CI 16). I believe that this application of the law is misconstrued.

In our opinion, the provision in Article 22(1) does not call for any interpretation for which the jurisdiction of the Supreme Court under Article 130(2) should be invoked. There is a plethora of decided cases to the effect that where the words used in a provision in the constitution are clear and unambiguous there is no need to refer same to the Supreme Court for interpretation. The court merely goes ahead to implement the provision as it is. Article 22(1) which is the basis of the Appellant's claim provides

22(1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.

This provision is so clear and unambiguous that we do not see why the High Court judge was required to call on the Supreme Court for interpretation. We hold that the High Court was perfectly within jurisdiction when he applied Article 22(1) without reference.

Another relevant issue was whether the High Court purported to re-write the will of the Testator by making the orders it did.

The general or common law rule is that a testator of a will is free to make his will and distribute his estate as he pleases. He is not bound to leave any fixed portion of his estate to any particular person and he is permitted to be capricious and improvident. As **Knight Bruce** said in **Bird v Luckie (1850) 68 ER 373**:

> "No man is bound to make a will in such a manner as to deserve approbation from the prudent, the wise or the good. A testator is permitted to be capricious and improvident, and is more at liberty to conceal the circumstances and the motives by which he has been actuated in his dispositions. Many a testamentary provision may seem to the world arbitrary, capricious and eccentric, for which the testator, if he could be heard, might be able to answer most satisfactorily."

In the case of **In Re Arthur (Deceased) Abakah and Another v. Attah-Hagan and Another [1972] 1 GLR 435 Archer JA** (as he then was) said:

> "What should be borne in mind is that whenever a will is granted, the court is not giving its blessing and support to all the contents of the will. The court is only expressing its satisfaction that the will has been validly executed and that the named executors are at

liberty to administer the estate. The Court should be extraordinarily slow in interfering with the will of a deceased person because the will constitutes hallowed ground and no one should tread upon it. If the Court decides to interfere, it does not expunge anything from the will. If it decides to omit anything on the well-known grounds, the omission is made in the probate and not in the will itself. For instance, the court will exclude from a will any words introduced into the will by mistake without the instructions or knowledge of the testator. The court may exclude from the probate and from registration words of atrocious, offensive or libellous character and it will exclude words of a blasphemous character."

However, **Section 13(1) of the Wills Act, 1971 (Act 360)** provides that:

"If upon application being made, not later than three years from the date upon which probate of the will is granted, the High Court is of the opinion that a testator has not made reasonable provision whether during his life time or by his will, for the maintenance of any father, mother, spouse or child under 18 years of age of the testator, and that hardship will thereby be caused, the High Court

may, taking account of all relevant circumstances, notwithstanding the provisions of the will, make reasonable provision for the needs of such father, mother, spouse or child out of the estate of the deceased".

This has been given a constitutional in Article 22(1) of the Constitution of Ghana, 1992 provides that:

"A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not a spouse died having made a will."

The effect of Article 22(1) of the Constitution, 1992 and Section 13(1) of the Wills Act, 1971 is that even though a testator may have made certain devolutions in his will, if he does not make reasonable provision for either his father, mother, spouse or child under 18 years, and as a result great hardship will befall them, then upon an application to the High Court, the Court may make orders for reasonable provision out of the deceased's estate for such a person, irrespective of what is in the will.

However, this power given to the court is not limitless. The Court must be satisfied:

a) that the Appellant is a dependant on the testator

b) that the application has been brought within three years after the granting of the probate of the will
c) that the testator failed, either during his lifetime, or by his will, to make reasonable provision for the Appellant
d) that the Appellant is suffering, or likely to suffer hardship, and
e) that having regard to all the relevant circumstances the Appellant is entitled to support out of the estate of the testator.

The respondents contends that by making the orders which purported to make provision for the appellant, the Trial Court judge was re-writing the will and that amounted to exceeding its powers.

We think that this claim is unfounded and seeks to defeat the whole purpose of **section 13(1) of the Wills Act**. The High Court has the authority to make such orders which will cause changes to be made in the testator's will, however as admitted earlier, the exercise of such authority should be guided, and with the sole purpose of preventing great hardship from befalling the Appellant.

The court of appeal conceded that the Wills Act permitted the rewriting of a testator will to make provision for certain categories of people, but opined that in a matter under section 13(1) of the Wills Act, the parties must place before the trial court all the "relevant circumstances".

However, they found that those facts were absent and so the trial Court's decision was based on speculations. **Gbadegbe J.A** (as he then was) made the following statements:

> "In this regard, the requirement of placing all the facts before the court that might indicate the Appellant's needs in terms of bare necessities and other requirements of a decent standard of living become relevant in order to assist the court to consider the extent and mode of its interference as provided in sub-section 2 of section 13. Where, however, these vital facts are absent as was the case in the court below then the court is precluded from a fair determination of the discretion available to it. I venture to say that on the materials before the court below on which the decision on appeal is based the determination made was without regard to the "relevant circumstances" and may thus be said to be based purely on speculation and or conjecture, a situation that defeats the clear statutory intention discernible from the enabling section".

The learned Justices were of the opinion that the Appellant should have shown in her affidavit all relevant circumstances which included:

a. her current means of support and income (if any)

b. her previous means of support during the lifetime of the deceased testator
c. how she was maintained in the past
d. her special needs such as nursing and or medical care to be provided for beyond that which is normally required for an ordinary person (if any)
e. her age
f. her requirements in monetary terms

The respondent as the administrator of the estate also had the responsibility of presenting to the court the particulars of the net value of the assets and indicate whether there are income earning assets. She should have also shown the quantum of the liabilities to be discharged. As well as the full particulars of the beneficiaries and any other facts that are likely to affect the court in the exercise of its discretion. We agree that this was the proper thing to be done and it would have made the work of the trial court easier.

That notwithstanding, we think a greater part of "the relevant circumstances" were deposed in the affidavit evidence and some reasonable inferences could also be made from the available evidence

and the will, which provided enough facts for the trial Judge to rely on in order to make his determination.

It is clear that the appellant had been living in the deceased's Odwaa house since her marriage to him in 1971 at 18 years. She continued to live there after his death. She also was farming on the testator's farm in Odwaa before his death and even after his death she was taking proceeds from the farm to maintain herself. She stated that she had nowhere to go if she was sacked from the house. This showed that the appellant had been relying on her deceased husband for all her adult life and so taking her out of the house and denying her of any proceeds from the farm will render her homeless and cause great hardship to her.

The respondents also attached the will and so all the information on the extent of the deceased's estate was available to the trial judge. It was based on these facts that the trial judge made the determination and not on speculation or conjecture as found by Court of Appeal.

Azu Crabbe in **Law of Wills in Ghana** stated at page 110, paragraph two:

> "… The rest whether the testator had not made a reasonable provision is an objective one, and a Court of Appeal will seldom interfere with the decision of the trial Judge, unless it can be

demonstrated that the trial Judge misapprehended the facts, or some question of principle is involved, or where serious injustice would occur without reassessment of the law and the facts."

We do not think there were enough grounds to completely reject the findings of the trial Judge. The trial Judge found that the appellant will suffer great hardship if she is excluded from the benefit of her deceased husband's estate. We agree with the learned judge and we do not think this should be disturbed.

More so, the courts have said in several cases that they will rather look at the substance of a case rather than the form. As such the court will not allow their primary aim of doing justice be turned aside by technicalities. The Court of Appeal's decision appears to be based on technicalities and so should be dismissed – **Okofoh Estates Ltd v Modern Signs Ltd (1996- 1997) SCGLR 224.**

Another issue was whether the testator had good reason for excluding the appellant from his will? The respondent continues to press on the court that the testator, George Asare Ntim, excluded the appellant from his will because she was disrespectful to him and never allowed the deceased to have a happy marriage. They rely on the English case of **In**

Re White (1914) CH 192 and appear to be telling the Court that that is good enough reason for the appellant to be excluded. In that case, the court held that the ordinary relationship of mother and daughter had never existed between the deceased and the Appellant. See paragraph 23 of the respondent's statement of case at the Court Appeal. We do not think our courts should be persuaded by this case.

The highest law of the country, the 1992 Constitution, in article 22(1) requires that a person should be reasonably provided for from the estate of his or her spouse. This provision was not required to take effect only when a marriage was thriving or peaceful; but in all marriages. In the case of **Humphrey- Bonsu and Another v Quaynor and Others (1999- 2000) 2 GLR 781**, an application under section 13(1) of the Wills Act was also made. It was an application by the widow of the testator and her two children who were dispossessed by the testator's will.

The Court of Appeal through **Benin J.A** in deciding that the widow was entitled to reasonable provision said:

> "The first plaintiff (wife) who was a pensioner with no monthly pension and no significant source of income was dependent on the husband before the separation and I hold that he continued to be

responsible for her… The rule is that if the Language of the statute is clear, it must be enforced however harsh the result may appear to be".

In this case, even though the testator and the widow were separated, it did not prevent the Court of Appeal from making reasonable provision from the will for the widow.

This shows that whatever the situation in a marriage is, a spouse should be reasonably provided for. As such, the appellant in this case is entitled to receive reasonable provision from her deceased husband's estate.

The last question to answer is whether in all the circumstances of the case the orders that the High Court made justifiable and just. We must bear in mind the general rule that a court cannot re-write a testator's will. The High Court under **section 13(1) of Act 360** can only make orders that will alleviate the hardship on an Appellant. It does not give the court the power to totally redistribute the deceased's estate. **Section 13(2) of the wills Act, 1971** states that:

"Without prejudice to the generality of subsection (1), such reasonable provision may include—

(a) payment of a lump sum, whether immediate or deferred, or grant of an annuity or a series of payments;

(b) grant of an estate or interest in immovable property for life or any lesser period.

This provision does not demand that only the reliefs stated can be granted by the court. However, the court should not abuse this power or appear to be re-writing the will of the testator.

On that note, we agree with the respondents that the orders made by the trial Judge were in excessive in the circumstances. For example, the High Court Judge made an order that one plot of the Testator's land known as House Number B262/15, West Abossey Okai, Accra should be given to the appellant. We think this order was not necessary to prevent the hardship of the appellant since, from the evidence given, it was never stated that she was living in that house rather she had lived in the Odwaa house throughout her married life.

CONCLUSION AND ORDERS

We hold the view that the decision of the Court of Appeal should be set aside and the decision of the High Court restored with modifications. The reliefs granted by the trial Judge should be reviewed and fresh orders made for the reasonable provision out of the estate of George Asare Ntim for the appellant as follows;

1. The appellant be permitted to occupy the Akokooaso room in which she lived at the time of the testator's death.
2. With regard to the farm at Odwaa the testator's wish was that it be divided into 3 parts; two parts to the respondent and her six children and the third part to the appellant's 3 children. This is reviewed only to the extent that the third part should go to the appellant and her 3 children while the other two parts to be given to the respondent and her six children.
3. It should be added that pursuant to Section 13 (2) (d) of the Wills Act the appellant is to have the benefit of the room and the farm for her life, thereafter they revert to the devisee's under the will.

The decision of the Court of Appeal is set aside and the decision of the High Court is restored with modifications.

P. BAFFOE – BONNIE

JUSTICE OF THE SUPREME COURT

IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – GHANA

SUIT NO. CA. J4/42/2012

A.D. 09/11/2016

CORAM: BAFFOE-BONNIE (Presiding); AKOTO-BAMFO (MRS); BENIN, APPAU & PWAMANG, JJSC.

IN THE MATTER OF THE WILLS ACT, 1971 [ACT 360] AND THE 1992 REPUBLICAN CONSTITUTION

AND

IN THE MATTER OF THE ESTATE OF GEORGE ASARE NTIM (DEC.)

AND

APPLICATION FOR REASONABLE PROVISION OUT OF THE ESTATE OF GEORGE ASARE NTIM (DEC.)

AKUA MARFOA

Versus

MARGARET AKOSUA AGYEIWAA

YAW APPAU, JSC.

I had the opportunity to read beforehand the lead judgment of the President of the Court and I agree with him that the appeal be allowed in part. I, however, wish to make some few observations of my own.

This appeal is against the judgment of the Court of Appeal dated 31st March 2006. The appeal arose from an originating notice of motion filed in the High Court on 15th July 2002 by the Appellant herein against the Respondent. The Appellant was successful in the trial High Court but lost in the Court of Appeal when the Respondent challenged the decision of the trial High court in the Court of Appeal. She has therefore come before us for another post-mortem of the decision of the Court of Appeal.

The facts culminating in this appeal are that; one George Asare Ntim died testate on 15th July 1995. He was survived by two wives. In his last will and testament, he gave out his properties making up his estate as follows:

"1. I give and bequeath jointly to my wife Margaret Akosua Agyeiwaa and her children by me namely (i) Comfort Dufie, (ii) Beatrice Asare Ntim, (iii) Gladys Yaa Serwaa, (iv) Patrick Kwasi Asiedu, (v) Joseph Asare Ntim and (vi) Christiana Asare Ntim my dwelling house known as House No. B.262/15 West Abossey Okai.

2. I devise my house known as House No. D1 Akokoaso as follows: - (a) Three (3) rooms facing the motor road, one each to my children Nancy Abena Pokuaa, Rosina Yaa Gyammea and Andrews Kwabena Nti; (b) The remaining portion of the said house to my wife Margaret Akosua Agyeiwaa and our children named in clause 1 above.

3. I direct that my farm at Odwaa near Akokoaso should be divided into three parts and one-third portion given to my children Nancy Abena Pokuaa, Rosina Yaa Gyammea and Andrews Kwabena Nti – see clause 2 (a) above. The remaining two-thirds portion should be given to my wife Margaret Akosua Agyeiwaa and our children – see clause 1 above.

4. I direct further that any furniture or fixtures in the houses or rooms as devised should pass with the house or room as devised.

5. I give the residue of my estate including any property to be acquired hereafter to all my children in equal shares…"

The testator did not make any provision at all for one of his two wives in the said will though he did provide for the three children he begat with the said wife. This wife happens to be the Appellant herein. Being aggrieved after she had unsuccessfully challenged the validity of the will in the High Court, Appellant applied to the High Court, praying the court to make reasonable provision for her out of the estate of her late husband since she was not mentioned at all in the will. She did so on the authority of the Wills Act, 1971 [Act 360], particularly section 13(1) and then article 22 (1) of the 1992 Constitution.

Section 13 of the Wills Act, 1971 [Act 360] provides as follows:

"13. (1) If, on an application made, not later than three years from the date on which probate of the will is grated, the High Court is of the opinion

(a) that a testator has not made reasonable provision whether in life or by will of the testator for the maintenance of a father, mother, spouse or child under eighteen years of age of the testator, and

that hardship will be caused, the High Court may, taking account of the relevant circumstances, despite the provisions of the will, make reasonable provision for the needs of the father, mother, spouse or child out of the estate of the deceased.

(2) Without prejudice to the generality of subsection (1), the reasonable provision may include

(a) payment of a lump sum, whether immediate or deferred, or grant of an annuity or a series of payments, and

(b) grant of an estate or interest in immovable property for life or a lesser period." {Emphasis mine}

Article 22. (1) of our Constitution, 1992 also provides: ***"A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will."*** {Emphasis mine}

The application was brought against her rival spouse who had been granted letters of administration with will annexed to administer the estate according to the will when the executors appointed in the will by the testator renounced probate. Though the Respondent deposed to the fact that she was only a devisee in the will which had other devisees or legatees for which she could not defend the application, she strongly opposed the application and deposed to facts justifying why it must not be granted. It is proper she did so because, as an administratrix of the estate of her late husband, Respondent was the proper person to be dragged to court on such an application. Her argument therefore that she could not defend the action because she was a legatee was neither here nor there.

It is appropriate to stress that the grant of an application under section 13 (1) to a surviving spouse is not premised only on the fact that he/she was a spouse and was not mentioned in the testator's will. It is trite learning that before a court could grant an application under section 13 (1) of Act 360, it must be satisfied that:

- ***a.*** *The applicant was dependent on the testator;*
- ***b.*** *The application has been brought within three years after the grant of probate of the will;*

c. *The testator failed, during his lifetime, or by his will, to make reasonable provision for the applicant*

d. *The applicant is likely to suffer hardship if no reasonable provision is made for her; and*

e. *Having regard to all the relevant circumstances, the applicant is entitled to support out f the estate of the deceased testator.*

The High Court, after hearing arguments from both parties, granted the Appellant's motion as prayed. This was on 25th February 2003. The trial High Court held that the Appellant had fully satisfied the requirements under section 13 (1) of the Wills Act, [Act 360] and article 22 (1) of the 1992 Constitution. It therefore concluded as follows:

"Having found on the totality of the evidence before the court that the testator did not make provision during his lifetime and in his will as required by law and the applicant having come to this court under section 13 (1) of the Wills Act, Act 360 and having proved that she was a spouse (wife) of the testator, the court under the authority of section 13 (2) of the Wills Act, Act 360, makes the following reasonable provision for the applicant as a charge on or attachment to the estate of the testator the late George Asare Ntim as follows: -

(1) One plot of the testator's land known as House No. B.262/15, West Abossey Okai, Acca.

(2) One room in the house of the testator at Odwaa near Akokoaso for life.

(3) The testator's farm land at Odwaa near Akokoaso should be divided into two equal parts and one portion to go to the applicant (Akua Marfoa) and her children Nancy Abena Pokuaa, Rosina Yaa Gyammea and Andrews Kwabena Nti"

From the above conclusion, it could be gleaned easily that the reason behind the trial court's grant of the application was that:

(i) the Appellant was a spouse of the testator, and

(ii) the testator did not make any provision for her either during his lifetime or in his last will.

The Respondent initially appealed against the ruling of the trial High Court to the Court of Appeal on the sole ground that the judgment was against the weight of evidence on the record. She later filed four additional grounds of Appeal. The original ground of appeal called for a total re-hearing of the matter by the Court of Appeal as if it was the trial court, as was expounded by this Court in several authoritative decisions including the following: TUAKWA v BOSOM [2001-2002] SCGLR 61; ARYEH v AYAA [2010] SCGLR 891 and ACKAH v PERGAH TRANSPORT LTD [2010] SCGLR 728, etc.

The Court of Appeal, after examining the record, allowed the appeal and set aside the decision of the trial High Court. According to the Court of Appeal, though the Appellant proved that she was a spouse and again brought the application within time, the application itself was incompetent because the Appellant did not place all the necessary material before the court upon which the court could make determinations as envisaged under section 13 (1) of Act 360/71.

In the words of Gbadegbe, JA (as he then was), which I endorse, an applicant who comes to court under section 13 (1) of Act 360/71; *"must be able to show from the processes filed in support of the application that taking all the 'relevant circumstances' of the estate into account, he has not been reasonably provided for and that he is likely to suffer 'hardship' as a result of the inadequacy of the provisions made for him or in the absence of any provision for him in the last will of the deceased testator. Therefore…to sustain the application, the applicant must demonstrate from the affidavit in support that having regard to his needs, if the court does not intervene to make 'reasonable*

provision' for him out of the estate of the deceased testator, 'hardship' will thereby be caused to him".

The Appellant has, in his notice of appeal, called on us to set aside the judgment of the Court of Appeal and to remit the case for re-trial in the High Court on the following grounds:

a. That the Court of Appeal erred by placing excessive burden of proof on the Appellant regarding her dependence on the testator in his lifetime and the likelihood of hardship without reasonable provision.
b. That the Court of Appeal erred in making findings of facts not borne out by the affidavit evidence.
c. That the Court of Appeal erred in not ordering a re-trial in the light of the findings made.
d. That the Court of Appeal erred by not looking at the merits of the case but dwelt at length with technicalities which led to a miscarriage of justice.
e. That the Court of Appeal erred by not exercising its original jurisdiction to correct the mistakes of the trial court.
f. That the Court of Appeal erred by applying principles and practices incompatible with our society and not envisaged by our laws in particular, 1992 Constitution.
g. That the judgment is against the weight of evidence.

Though the grounds are seven in all, the Appellant, in her statement of case filed on 17/12/2013, argued all the grounds together as one ground, since according to her; "they are all interrelated". She chided the Court of Appeal for relying heavily on technicalities in deciding the appeal instead of re-hearing the matter afresh as if it was the trial court, as the authorities indicate. She attacked or impeached the judgment of the Court of Appeal on three fronts.

Firstly, she argued that the Court of Appeal did not consider the relative hardship that would occasion her in setting aside the orders of the trial High court. She referred to the case of Humphrey-Bonsu & Anor v Quaynor & Ors [1999-2000] 2 GLR 781 and the enabling section of the Wills Act, section 13 and contended that the Court of Appeal relied on foreign judgments in arriving at its decision instead of the Humphrey-Bonsu case (supra), which is on all fours with the instant matter. She re-called the dictum of Ocran, JSC on the over-reliance on foreign judgments when there are local authorities in the case of Hanna Assi (No. 2) [2007-2008] SCGLR 16 at pp. 34 and 35. She contended that she depended on the testator for everything and was residing in the matrimonial home at Akokoaso, which she has been asked to vacate.

Secondly, she was of the view that the Court of Appeal did not consider the appeal on the merits but on technicalities to deny Appellant reasonable provision. She referred the Court to the case of Ex-parte Yalley; (Gyane & Anor – Interested Parties) [2007-2008] SCGLR 512 on the duty of a court to do substantial justice but not to rely on technicalities. She said the Court of Appeal should have referred to Rules 31 and 32 of C.I. 19 of 1997 to call for further evidence. She supported this argument with the case of Amoah v The State [1966] GLR 737 – CA.

The third and last leg of Appellant's submissions was that, the Court of Appeal should have ordered for a trial ***de novo*** when it realised that the material placed before the trial court by both parties was not sufficient or adequate to merit the orders it made, for the matter to be determined on the merits. She referred to the provision under article 22 (1) of the 1992 Constitution and suggested that the Court of Appeal could even have referred the matter to this Court for this Court to make a constitutional determination on that provision.

In concluding her submissions, Appellant introduced some new matters which were not in issue before both the trial court and the Court of Appeal for the consideration of this Court. This is in respect of the share of a spouse in 'spousal property' or in other words; 'marital property'. After referring to recent decisions of this Court on the distribution of spousal property, viz; MENSAH v MENSAH [2012] 1 SCGLR 391 and ARTHUR (No. 1) v ARTHUR (No. 1) [2013-2014] 1 SCGLR 543, Appellant contended that what she was praying for in her application was; to be allowed to enjoy properties of which she was a part-owner as of right. In support of this contention, Appellant quoted the dictum of Date Bah, JSC in Arthur (No. 1) v Arthur (No. 1) (supra) as follows:

"Marital property is thus to be understood as property acquired by the spouses during the marriage, irrespective of whether the other spouse has made a contribution to its acquisition…It should be emphasized that in the light of the ratio decidendi in Mensah v Mensah, it is no longer essential for a spouse to prove a contribution to the acquisition of marital property. <u>It is sufficient if the property was acquired during the subsistence of the marriage."</u> {Emphasis added}

According to her, the above decisions applied to her case as she is entitled to a share of the marital property *ex debito justitiae* and by implication, the *nemo dat quod* principle caught up with the deceased testator as he could not have disposed of property of which she had beneficial interest. Since the testator had two wives, this Court should consider what rightly belongs to her under the law. She said, since the demand she is making is a constitutional one, it could be raised for the first time in this Court, referring to the decision of this Court in Dexter Johnson v The Republic [2011] SCGLR 601 and the *Hanna Assi (No. 2) case* (supra). She submitted as follows:

"My Lords, we submit with respect that, although not specifically asked for at the trial, the Supreme Court, exercising its inherent jurisdiction, should award the appellant a share in the matrimonial properties as of right. In the alternative in the interest of justice, we pray that the Court sets aside the decision of the Court of Appeal and restore the ruling of the High Court awarding reasonable provision out of the deceased estate for the benefit of the appellant".

Judging from the Notice of Appeal filed in this Court on 20/06/2006 by the Appellant and the submissions made in her statement of case filed on 17/12/2013, it appears the Appellant is not very sure of the actual relief(s) she is seeking from this Court. While in her notice of appeal, the relief sought by the Appellant from this Court was to set aside the judgment of the Court of Appeal together with the costs and to remit the case to the High Court for re-trial; her prayer in her submissions before us is to set aside the judgment of the Court of Appeal for this Court to invoke its inherent jurisdiction to grant her a share in what she called 'matrimonial properties' or in the alternative, to restore the ruling of the trial High Court.

My Lords, notwithstanding the seeming contradictions in the reliefs sought from us by the Appellant in this appeal, I find it as a duty bestowed on us by law and on the strength of our own decisions as the highest court of the land, to re-consider the whole case before us as if we were the trial court to determine whether the Appellant's application was worth any consideration at all. This is particularly so when one of the grounds of appeal before us is that; 'the judgment of the Court of Appeal in setting aside the decision of the High Court in its entirety was against the weight of evidence adduced at the trial.

In this light, I find it appropriate to commence our determination of the appeal by looking at the last leg of Appellant's submissions on the distribution of 'spousal' or 'marital' property, which is a new issue altogether that the Appellant never raised in any of the two lower courts. Appellant centred all his arguments on the recent decisions of this Court on the distribution of spousal property as spelt out in the Mensah v Mensah case (supra) and later affirmed in the Arthur v Arthur case (supra).

This Court derived its strength mostly from article 22 of the 1992 Constitution and other case law in arriving at its decision in Mensah v Mensah (supra) and the others that followed afterwards, which the Appellant has referred this Court to. The whole of article 22 of the 1992 Constitution provides:

22. (1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.

(2) Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.

(3) With a view to achieving the full realisation of the rights referred to in clause (2) of this article –

(a) spouses shall have equal access to property jointly acquired during marriage;

(b) assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon the dissolution of the marriage."

A proper reading of the whole of article 22 of the Constitution quoted above shows clearly that the legislative intent with regard to the provisions under clause (1) of the article in question is different from the one in respect of the provisions under clause (3). Though the two clauses fall under the same article; i.e. article 22, they speak different languages. There is nothing ambiguous about that.

Clause (1) gives constitutional backing to section 13 (1) of the Wills Act, 1971 [Act 360] on the power of the court to make reasonable provision out of the estate of a deceased spouse in favour of a surviving spouse where the deceased spouse died testate but made no such provision. The rationale behind this provision is to avoid hardship being caused to a spouse who wholly depended on the testator during his/her lifetime, but in whose favour no provision was made by the testator either in his lifetime or in his last will and testament.

The section does not talk about reasonable provision out of 'matrimonial property', or 'marital property', or 'spousal property', or property jointly acquired during the subsistence of the marriage. It talks about; **'reasonable provision out of the 'estate of a spouse'**, which presupposes that the estate from which the provision is to be made belongs solely to the deceased spouse**.** The cardinal principle underlying this section is therefore that the estate must be that of the deceased spouse but not a joint estate acquired by the two.

Clause (3), on the other hand, talks about distribution of property jointly acquired during marriage upon the dissolution of the marriage. It talks of distribution of property acquired during marriage upon dissolution of marriage but not upon death. Such property that is to be distributed is called; 'spousal property' or 'marital property' since it was jointly acquired during the subsistence of the marriage, irrespective of who contributes what or not. The major yardstick for equitable distribution is that the property was acquired by the two spouses in the course of their marriage.

The Court, in the Mensah v Mensah case (supra) held: ***"Common sense and principles of general fundamental human rights would require that a person who was married to another, and had performed various household chores for the other partner like keeping the home, washing and keeping dirty laundry generally clean, cooking and taking care of the partner's catering needs as well as those of visitors, raising up the children in a congenial atmosphere and generally supervising the home such that the other partner had a free hand to engage in economic activities, must not be discriminated against in the distribution of properties acquired during the marriage when the marriage was dissolved. The reason was that the acquisition of the properties had been facilitated by the massive assistance that the one spouse had derived from the other"***

What article 22 (3) means was amply stated by this Court in Mensah v Mensah (supra) at page 393 thus; ***"it was quite clear that the provisions in article 22 (3) (a) and (b) of the 1992 Constitution had espoused the principle of having equal access to property jointly acquired during marriage and that of equitable distribution of such property upon divorce".*** {Emphasis mine}

From the above provisions of the Constitution, 1992, there is no doubt to the fact that the principles governing actions for claims under article 22 (3) are different from those governing actions under section 13 (1) of the Wills Act and article 22 (1) of the 1992 Constitution. While a claimant under article 22 (3) (a) and (b) must establish that the property in question was jointly acquired during the marriage without the need to prove contribution in any form in order to succeed, an applicant under section 13 (1) of Act 360/71 and article 22 (1) of the 1992 Constitution need not do so. What such an applicant needs to do is to show or establish that:

1. ***he/she was a surviving spouse;***
2. ***he/she was dependent on the deceased spouse during the deceased's lifetime;***
3. ***the deceased spouse died testate but made no provision for him/her either in his/her lifetime or in the will;***
4. ***he/she is likely to suffer hardship as a result of the testator's failure to make any provision for him/her.***

There is no need for such a spouse to establish that the property, from which the reasonable provision is made, was jointly acquired during the marriage.

In the Appellant's application before the trial court, she never said anywhere, either in her affidavit in support or in her submissions before the court that the properties forming the estate of the deceased testator from which she was praying for a reasonable provision, was jointly acquired by she and the late husband during their marriage. She mentioned two houses (one in Accra and the other in their village Akokoaso) and then one farm belonging to the deceased testator. She did not say that those two houses and the farm were acquired during the subsistence of her marriage with the deceased. She did not tell how the deceased who had two wives at the time of his demise, came to own or acquire those properties.

In paragraph (8) of her own affidavit in support, she deposed; ***"That my late husband had two houses (one in Accra and the other at Akim Akokoaso in the Easter Region)".*** This was an admission that the properties in question belonged solely to the deceased testator in the absence of any evidence to the contrary. What the law calls 'marital property' or 'spousal property' is property acquired by a couple during the subsistence of their marriage. When a spouse acquires property solely before marriage, such property cannot be called 'marital property' or 'spousal property' stricto sensu, to be distributed under the provisions of article 22 (3) of the 1992 Constitution.

It is on record that before applying to the trial High Court for a reasonable provision to be made out of the testator's estate, Appellant challenged the validity of the testator's will and lost. The will was therefore declared valid by the High Court and admitted to probate upon proof in solemn form. When the Appellant therefore filed her application in the trial High court, she knew she was making a request under section 13 (1) of the Wills Act and article 22 (1) but not under article 22 (3). The Appellant's prayer that she should be provided for on the authority of article 22 (3) and the decisions in Mensah v Mensah and Arthur v Arthur (supra), cannot therefore succeed as she has not established the necessary ingredients that call for the application of the principles laid down in those decisions.

On the point that the Court of Appeal decided the appeal on technicalities and resorted to foreign judgments instead of the authority laid down in the Humphrey Bonsu case (supra), I wish to state that the requirements that the Court of Appeal laid down in its judgment as those required for a successful applicant under section 13 (1) of Act 360 are not different from those expressed in the Humphrey-Bonsu case and other cases decided locally, though the Court of Appeal never referred particularly to any of those local cases.

The Court of Appeal, in the Humphrey-Bonsu case (supra), held at page 784-785 that; ***"Although Act 360 did not define when dependency might arise, it would not be wrong to suggest that … in the case of a spouse the court would have to examine the extent of his or her earnings, earning capacity and the contribution to the upkeep and maintenance of the other and if the surviving spouse was contributing more than the deceased or even in equal shares with the deceased, a dependency would not arise".***

As has been stated above, before an applicant can succeed on such an application after she has filed it within the three year period after the grant of probate or administration with will annexed, she must establish four ingredients:

1. That he/she was a spouse of the deceased testator;
2. That he/she was dependent on the deceased during his/her lifetime;
3. That the deceased spouse made no provision for him/her during his/her lifetime or in his/her will;
4. That he/she is likely to suffer hardship if no provision is made for him/her.

In the Humphrey-Bonsu case, unlike in this case, overwhelming evidence was led to establish that the applicant was dependent on the deceased testator notwithstanding the rifts in their marriage therefore if no reasonable provision was made for her, she would suffer hardship. In this case, nothing substantial was placed before the trial judge, as the Court of Appeal rightly found, to suggest that the Appellant herein wholly depended on the deceased testator so there is the likelihood of her suffering hardship if no provision is made for her. From her affidavit in support, the major reason that propelled her application was that when she goes to her village; i.e. Akokoaso, where she was residing with the deceased during his lifetime, she resides in the Akokoaso house of the testator so if she is kicked out from that house as the Respondent intended to do, she would have nowhere to stay at Akokoaso. These were her own depositions in her affidavit in support of the application, which need no further clarification:

"8. That my late husband had two houses (one in Accra and the other at Akim Akokoaso in the Eastern Region).

9. That whereas the respondent was provided for both houses, I was not.

10. That meanwhile the respondent has caused her solicitor to write to me to vacate from the Akokoaso house where I stay anytime I go there as I hail from there.

11. That meanwhile, I have nowhere to stay should I be ejected.

12. That I am advised by my solicitor and verily believe same to be true that it is lawful and reasonable that provision is made for me by the court by virtue of both the 1992 Constitution and the Wills Act of 1971.

13. That greater hardship shall be visited on me unless provision is made for me.

14. That I pray that the court will order that I should be given part of the deceased's Accra house (which comprises two plots of houses) and also part of the Akokoaso house as well as part of the deceased's farmland." {Emphasis mine)

Appellant did not explain or indicate in anyway, either in her affidavit in support of the application or in her submissions before the trial court, how she depended on the deceased testator during his lifetime and the likelihood of her suffering any hardships without any reasonable provision for her out of the deceased's estate aside of her complaint that she would have nowhere to stay anytime she goes to Akokoaso if she was ejected from the said house.

It is very difficult to explain why the testator made provision for one of his two wives and all his children with both wives but shut out completely the Appellant. It has been alleged that the Appellant deprived the testator of a happy marriage life. However, no meat was added to this skeletal allegation which was not denied anyway by the Appellant. Could this be the reason behind the testator's decision to black-out Appellant in his will?

There is no doubt that each and every one has the unchallenged right to distribute his/her self-acquired property the way he/she wants subject to the provisions of section 13 (1) of Act 360 and article 22 (1) of the 1992 Constitution. To quote the words of a retired Chief Justice of this land Samuel Azu Crabbe in his book; "The Law of Wills in Ghana", published by Vieso Universal (Ghana) Limited, Accra-Ghana (1998); ***"The general rule …is that the court has no power to redraft a will, or add words to it. The duty of the Court is to construe the testator's will in accordance with the established rules of construction and not to make a new will for him. To relieve the family of the testator from unwarranted hardship, therefore, Section 13 was enacted. This section confers a limited power on the court notwithstanding the provisions of the will, to make a reasonable provision for the needs of the testator's parents, spouse or children under 18 years of age out of his estate, where the testator had failed to make adequate provision for them."*** {Emphasis mine}

However the application of the above provisions is not automatic but also subject to established principles or criteria as outlined supra. The reasons that the trial court gave in granting the application, i.e. (i) that the testator did not make any provision for the Appellant during his lifetime and in his will and (ii) that the Appellant has proved that she is a spouse, were short of what the Appellant should have placed before the trial court. In fact, she should have gone further to establish her dependency on the deceased testator during his lifetime, and the likelihood of hardships she was to suffer in the absence of any reasonable provision for her out of the estate.

From the record before us, the only likelihood of hardship that the Appellant said she would suffer, granted that she did establish any, was where she would stay any time she travelled to her village Akokoaso. So if the trial court was minded in making any provision at all, it should have been the second order it made in its ruling; i.e. that the Appellant be given one room in the testator's house at Odwaa near Akokoaso for life. What the trial judge did in ordering the Appellant to be given one plot of land from the deceased's Abossey-Okai property when there was no evidence that there was a vacant one plot in that premises and also that the deceased's Akokoaso farmland be divided into two for the Appellant and her three children with the deceased to take half, whilst the Respondent and her six children took the other half, contravened subsection (2) of section 13 of Act 360.

Subsection (2) of section 13 says any provision or grant of an estate or interest made in respect of immovable property must be for life or a lesser period. However, the provisions the trial High Court made in respect of the two immovable properties in favour of the Appellant were orders made to run in perpetuity.

The power granted the courts under section 13 of Act 360 and section 22 (1) of the Constitution, 1992 to make reasonable provision from the estate of a deceased spouse to a surviving spouse did not clothe the trial court with authority to re-write the will of the testator and to re-distribute his properties the way the trial court did. That power is limited as was rightly stated by Azu Crabbe, C.J in his book under reference. That is why the authorities define a spouse who qualifies for reasonable provision as a spouse who was mostly dependent on the deceased testator during the testator's lifetime and was likely to suffer hardship should such a provision be denied. The hardship to be suffered must be indicated and known and the sort of dependency must be stressed and explained. The Appellant offered none of these aside of the fact that she would have nowhere to stay any time she visited Akokoaso in case she is ejected from that house.

The testator in his will, devised one-third (1/3) of his Akokoaso farm to the Appellant's three children and the remaining two-thirds (2/3) to the Respondent and her six children. Appellant's children did not complain about their share. By ordering that the testator's Akokoaso farmland be divided into two equal halves for the Appellant and her three children to take half whilst Respondent and her six children took the other half was tantamount to making more provision for the children of the Appellant when they had not applied to the court for any such provision. This means the trial court was making provision for persons who never applied before it for such provision. This conduct was tantamount to re-distributing the deceased testator's properties but not making reasonable provision flowing from the needs of the Appellant as applicant.

The Appellant, in her application before the trial court, did not indicate where she lives or stays to make a living, the work she does, her age, whether she is in any other difficulty apart from where to live or stay any time she goes to Akokoaso, etc. As the Court of Appeal rightly found, not much was placed before the trial court in the form of affidavit evidence to merit the orders the court made. The trial court, during its ruling, did not demonstrate that it considered any relevant circumstances arising out of the application before it as the basis or foundation for its orders. To borrow the words of Gbadegbe, JA (as he then was), it appeared the trial judge proceeded with the matter, ***"as though the mere absence of a testamentary provision for the applicant in a case where her rival was provided for justified him in making an intervention under the law".*** The trial court had it all wrong.

The only problem I have with the judgment of the Court of Appeal is the position it took in not deciding the appeal on its merits but dismissed it for the failure of the Appellant to place all the necessary material before the trial High Court to merit the orders it made in its ruling. However, I do not think this is a matter that should be remitted to the trial High Court for re-consideration in a trial de-novo as prayed by the Appellant. I am of the view that, having come to the conclusion that the Appellant did not place enough material before the trial court to merit the provisions it made in favour of the Appellant and her children, the Court of Appeal, instead of allowing the appeal and setting aside the judgment of the trial High court in its entirety, should have considered the case as a whole in order to appreciate the merits and demerits in the provisions the trial court made in favour of the Appellant.

From my consideration of the application made before the trial High Court, the Appellant's major concern was that she had been written to by the Respondent's lawyer to vacate the Akokoaso house where she lives any time she goes to Akoakoaso and that if that is made to materialise, she would have nowhere to stay any time she goes to her hometown at Akokoaso. This fact was not denied by the Respondent. The Respondent's answer was that the Appellant is residing in the portion devised to her three children in the testator's will. Whether that is the correct position or not, I think it is fair that the Appellant is given one room of her own in the Akokoaso house for life as the trial High Court did order in its ruling.

Again, it appeared the testator intended to give his nine children equal shares in the Akokoaso farm. That is why he gave the Respondent's six (6) children two-thirds (2/3) portion of the farm and Appellant's three (3) children one-third (1/3) portion. The only thing he did differently was that he made the Respondent a beneficiary of the 2/3 share to her children but failed to do same for the Appellant. I think it is reasonable to add the Appellant to her three children as a beneficiary of their one-third (1/3) portion, but for life.

It is for the above reasons that I endorse the decision of my brother Baffoe-Bonnie, JSC to allow the appeal in part.